

Americans have the right to go into our Federal courts and have their cases judged based on the Constitution and our laws, not on politics or personal feelings. The lower court's belief that citizens should be reduced to racial statistics is flawed. It only divides people who don't wish to be divided along racial lines. The very reason we have civil service rules is to root out politics, discrimination, and nepotism. Our case demonstrates that these ills will exist if the rules of merit and the law are not followed.

Our courts are the last resorts for Americans whose rights are violated. Making decisions on who should have command positions solely based on statistics and politics, where the outcome of the decision could result in injury or death, is contrary to sound public policy.

The more attention our case got, the more some people tried to distort it. It bothered us greatly that some perceived this case as involving a testing process that resulted in minorities being completely excluded from promotions. That was entirely false, as minority firefighters were victimized by the city's decision as well. As a result of our case, they should now enjoy the career advancement that they've earned and deserve.

Enduring over 5 years of court proceedings took its toll on us and our families. The case was longer—was no longer just about us, but about so many Americans who had lost faith in the court system. When we finally won our case and saw the messages we received from every corner of the country, we understood that we did something important together: we sought basic fairness and even-handed enforcement of the laws, something all Americans believe in.

Again, thank you for the honor and privilege of speaking to you today.

Senator CARDIN. Mr. Ricci, thank you very much for your testimony.

We'll now hear from Lieutenant Ben Vargas. Benjamin Vargas is a lieutenant in the New Haven Fire Department and was a plaintiff in the case of *Ricci v. DeStefano*. He also worked part-time as a consultant for a company that sells equipment to firefighters.

Mr. Vargas.

STATEMENT OF LIEUTENANT BEN VARGAS, NEW HAVEN FIRE DEPARTMENT

Mr. VARGAS. Thank you. Members of this Committee, it is truly an honor to be invited here today.

Notably, since our case was summarily dismissed by both the District Court and the Court of Appeals panel, this is the first time I'm being given the opportunity to sit and testify before a body and tell my story. I thank you for this—Committee for the opportunity.

Senators of both parties have noted the importance of this proceeding because decisions of the United States Supreme Court can greatly impact the everyday lives of ordinary Americans. I suppose that I and my fellow plaintiffs have shown how true that is. I never envisioned being a plaintiff in a Supreme Court case, much less one that generated so much media and public interest. I am Hispanic and proud of the heritage and background that Judge Sotomayor and I share, and I congratulate Judge Sotomayor on her nomination.

But the focus should not have been on me being Hispanic. The focus should have been on what I did to earn a promotion to captain, and how my own government and some courts responded to that. In short, they didn't care. I think it important for you to know what I did, that I played by the rules and then endured a long process of asking the courts to enforce those rules.

I am the proud father of three young sons. For them, I sought to better my life and so I spent 3 months in daily study preparing for an exam that was unquestionably job-related. My wife, a special education teacher, took time off from work to see me and our children through this process.

I knew we would see little of my sons during these months when I studied every day at a desk in our basement, so I placed photographs of my boys in front of me. When I would get tired and went to stop—wanted to stop, I would look at the pictures, realize that their own futures depended on mine, and I would keep going. At one point, I packed up and went to a hotel for days to avoid any distractions, and those pictures came with me.

I was shocked when I was not rewarded for this hard work and sacrifice, but I actually was penalized for it. I became not Ben Vargas the fire lieutenant who proved himself qualified to be captain, but a racial statistic. I had to make decisions whether to join those who wanted promotions to be based on race and ethnicity or join those who would insist on being judged solely on their qualifications and the content of their character. I am proud of the decision I made, and proud of the principle that our group vindicated together.

In our profession, we do not have the luxury of being wrong or having long debates. We must be correct the first time and make quick decisions under the pressure of time and rapidly unfolding events. Those who make these decisions must have the knowledge necessary to get it right the first time. Unlike the judicial system, there are no continuances, motions or appeals. Errors and delays can cost people their lives.

In our profession, the racial and ethnic make-up of my crew is the least important thing to us and to the public we serve. I believe that countless Americans who had something to say about our case understand that now. Firefighters and their leaders stand between their fellow citizens and catastrophe. Americans want those who are the most knowledge and qualified to do the task. I am willing to risk, and even lay down, my life for fellow citizens, but I was not willing to go along with those who placed racial identity over these more critical considerations.

I am not a lawyer, but I quickly learned about the law as it applied to this case. Studying it as much as I studied for my exam, I thought it clear that we were denied our fundamental civil rights. I expected Lady Justice with the blindfolds on, and a reasoned opinion from a Federal Court of Appeals telling me, my fellow plaintiffs, and the public that the court's view on the law—what the court's view on the law was, and do it in an open and transparent way. Instead, we were devastated to see a one-paragraph, unpublished order summarily dismissing our case, and indeed even the notion that we had presented important legal issues to that Court of Appeals.

I expected the judges who heard my case along the way to make the right decisions, the ones required by the rule of law. Of all that has been written about our case, it was Justice Alito who best captured our own feelings. We did not ask for sympathy or empathy, we asked only for even-handed enforcement of the law, and prior to the majority Justice opinion in our case, we were denied just that.

Thank you.

Senator CARDIN. Thank you for your testimony.

We'll now hear from Peter Kirsanow. Peter Kirsanow serves on the U.S. Commission on Civil Rights. He's a member of the National Labor Relations Board, where he received a recess appointment from President George W. Bush. Previously, he was a partner with the Cleveland law firm of Benesch, Friedlander, Coplan & Aronoff. Mr. Kirsanow received his law degree from Cleveland State University.

**STATEMENT OF PETER KIRSANOW, COMMISSIONER, U.S.
COMMISSION ON CIVIL RIGHTS**

Mr. KIRSANOW. Thank you, Mr. Chairman, Senator Sessions, members of the Committee. I am Peter Kirsanow, member of the U.S. Commission on Civil Rights. I am currently back at Benesch, Friedlander in the Labor Employment Practice Group. I'm here in my personal capacity.

The U.S. Commission on Civil Rights was established by the—
Senator SESSIONS. Is that microphone on?

Mr. KIRSANOW. The U.S. Commission on Civil Rights was established by the 1957 Civil Rights Act to, among other things, act as a national clearinghouse for information related to denials of equal protection and discrimination.

In furtherance of the clearinghouse process, my assistant and I reviewed the opinions in civil rights cases in which Judge Sotomayor participated while on the Second Circuit in the context of prevailing civil rights jurisprudence, and with particular attention to the case of *Ricci v. DeStefano*. Our review revealed at least three significant concerns with respect to the manner in which the three-judge panel that included Judge Sotomayor handled the case.

The first concern was, as you've heard, the summary disposition of this particular case. The *Ricci* case contained constitutional issues of extraordinary importance and impact. For example, the issues of—that are very controversial and volatile—racial quotas and racial discrimination. This was a case of first impression, no Second Circuit or Supreme Court precedent on point. Indeed, to the extent there were any cases that could provide guidance, such as *Wygant*, *Crowson*, *Adderand*, even private sector cases such as *Johnson Transportation*, *Frank v. Xerox*, *Rubber v. Steelworkers*, would dictate or suggest a result opposite of that reached by the Sotomayor panel.

The case contained a host of critical issues for review, yet the three-judge panel summarily disposed of the case, as you've heard, in an unpublished, one-paragraph pro curium opinion that's usually reserved for cases that are relatively simple, straightforward, and inconsequential.